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No. .....

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In The

Supreme Court of the United States

October Term, 1982

THOMAS N. RUPE,

Petitioner,

vs.

RUTH BLAKE AND LOUIS DEKMAR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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QUESTIONS PRESENTED FOR REVIEW

1. Is the vote of a juror in deciding a verdict in a criminal case a form of speech protected by the provisions of the First Amendment of the United States Constitution so that the punishment of a state court juror on account of his verdict creates a cause of action under 42 U. S. C., § 1983?

2. Is the drafting and distribution of press releases by a state prosecuting attorney a judicial function protected by the absolute immunity recognized in *Imler v. Pachtman*?

3. Is a prosecutor who maliciously files false criminal charges against a juror to punish him for his verdict protected by the absolute immunity recognized in *Imler v. Pachtman*?

4. Does the decision of the highest court of a state, finding that an unpleaded affirmative defense is available to a civil defendant and reversing the decision of the court below based on the unpleaded affirmative defense, without affording the plaintiff an opportunity to present evidence relating to that defense, deny the plaintiff due process of law as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution?

5. May a state court considering a claim under 42 U. S. C. § 1983 alter the burden of proof on the question of good faith immunity required in Federal actions under this same state statute?

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The caption of this case contains the names of all parties.

OPINION BELOW

The official report of the opinion of the Wyoming Supreme Court appears at 651 P. 2d 1096.

The decision of the Wyoming Supreme Court sought to be reviewed was dated and entered on September 14,

1982. A Petition for Rehearing was denied on October 5, 1982.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision pursuant to 28 U. S.C., § 1257(3).

STATUTES INVOLVED

This case involves 42 U. S. C., § 1983:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Appellant/Plaintiff, Tom Rupe, the sixty-two-year-old Chief Building Inspector of Douglas, Wyoming, was called as a juror and served on the jury in a first degree murder case in State Court. The Appellees Blake and Dekmar were the prosecuting attorney and the prosecutor's investigator respectively, and prosecuted the murder trial. The jury found the defendant in that case not guilty. This verdict angered Blake and Dekmar and

they focused their anger on the jury and the Trial Court Judge.

They later learned that Mr. Rupe had pled guilty himself to an insufficient funds check charge some thirty years earlier. They also learned that Mr. Rupe's rights had been restored by the governor of Wyoming a year after his plea. Despite the fact they knew Mr. Rupe had been truthful in all of his responses made during jury qualification and selection, Blake and Dekmar decided to falsely charge Tom Rupe with perjury in those proceedings and to publicize the charges, in order to punish him for his participation in the jury verdict against them, and to intimidate other jurors from finding against them in the future.

Blake drew up the false charges and Dekmar signed them. Both of them knew the charges were false. The false perjury charge was filed and Mr. Rupe was summoned to answer to it. Blake then drew up a press release containing information of the charges against Mr. Rupe and other information derogatory to him and caused it to be distributed to the various news media. Dekmar went out of his way to see that Tom Rupe's employer was notified. A preliminary hearing was held before the local justice of the peace, who determined that there was no probable cause to bind Mr. Rupe over for trial. The perjury charge was dismissed. Unfortunately, Mr. Rupe had already suffered damages from the Defendants' malicious actions and outrageous conduct.

The action sought to be reversed was filed by Mr. Rupe against Blake and Dekmar seeking compensatory and punitive damages. The Complaint contained a cause of action for violation of Mr. Rupe's constitutional civil

rights under 42 U. S. C., § 1983. Causes of action were also asserted under state tort law.

At the close of the evidence the trial court dismissed the civil rights cause of action under 42 U. S. C., § 1983. The Defendants' argument in this regard was that § 1983 only protects federal constitutional rights and that no such rights were involved in this case. Plaintiff's counsel argued that the actions of the Defendants were directed towards punishing Mr. Rupe's honest deliberations as a juror and therefore violated his right to free speech under the First and Fourteenth Amendments. The case was submitted to a Converse County jury on the underlying tort claims and it returned a verdict in favor of Tom Rupe and against the Converse County Attorney and her investigator, assessing Sixty Thousand Dollars ($60,000.00) in actual damages and One Hundred Forty Thousand Dollars ($140,000.00) in punitive damages. The Trial Court entered judgment on the verdict and denied Defendants' post-trial motions, the Trial Judge commenting, ". . . . I haven't heard any case that's been on all 4's with this case—the prosecutor, the investigator, the defendant as a result of being a juror who sat in a case where there was an acquittal of a defendant." The Wyoming Supreme Court reversed on appeal with two justices dissenting.

The majority of the Wyoming Supreme Court held that Blake was protected from liability on all state court claims by an absolute prosecutorial immunity. That Court held that the press release made by the prosecutor was, "within the outer perimeter of the prosecutor's authority and discretion." Based on that holding the Wyoming Supreme Court found the dissemination of the press re-

lease protected by absolute immunity. Tom Rupe had filed an appeal from the trial court's dismissal of the Federal Civil Rights cause of action. The Wyoming Supreme Court, without specifically addressing the § 1983 action, found the Defendants clothed with immunity.

The Wyoming Supreme Court further held that Dekmar, the investigator, was not entitled to absolute immunity, but only had a qualified immunity if he acted in good faith and upon a reasonable belief in the lawfulness of his acts, citing *Scheuer v. Rhodes,* 416 U. S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). While Dekmar had never asserted this qualified immunity, relying solely on an extension of absolute immunity for prosecutors, and had never asserted that he acted in good faith or upon a reasonable belief in the lawfulness of his acts, the Wyoming Supreme Court found, "As a matter of law that he acted reasonably, in good faith in light of all the circumstances existing at the time." Based on that finding the Wyoming Supreme Court clothed Dekmar with the qualified immunity he had never alleged or sought to prove, and directed the trial court to enter judgment for Dekmar without giving the Plaintiff an opportunity to present evidence relating to the new defense.

Plaintiff brought this situation to the attention of the Wyoming Supreme Court in a Petition for Rehearing. The Petition was denied.

REASONS FOR GRANTING THE WRIT

This case presents important issues which have not been, but should be, settled by this Court. Those questions relate to 42 U. S. C., § 1983 and the immunities of

state prosecuting attorneys and their employees under that statute. They also relate to the qualified immunity given to officers of the executive branch of government and the requirements necessary to come within that immunity under federal law. The threshold question to all of these issues is whether the Plaintiff's claim falls within the protection of 42 U. S. C., § 1983.

The Wyoming Supreme Court found that the Defendants herein were acting in their official capacities in taking the actions which injured the Plaintiff (p. 4, Slip Opinion). Thus, their actions were under "color of law." If those actions deprived the Plaintiff of any "rights, privileges or immunities secured by the Constitution and laws," then the Plaintiff had a cause of action against the Defendants under 42 U. S. C., § 1983. The trial court held that no such cause existed. This decision was affirmed by the Wyoming Supreme Court.

The Plaintiff argued that a juror is protected from retaliation, on account of his verdict, by the United States Constitution. Specifically, Tom Rupe asserted that his right to freedom of speech secured by the First Amendment and applied to the states by the Fourteenth Amendment was violated by the Defendants' actions. He also cited the guarantee of impartial juries in criminal cases contained in the Sixth Amendment and the requirement of due process inherent in the Fourteenth Amendment which, he argued, required jurors be protected from attacks on their verdicts. Besides the obvious conflict between the trial court's decision and the First Amendment guarantee of free speech, this case presents basic questions regarding the structure of American govern-

ment. The Court's holding that jurors are not protected from attack bears on the doctrines of separation of powers and checks and balances. In effect, the decision creates a new check on the power of the judicial branch of government by the executive. This check has never before been recognized under the Wyoming Supreme Court decision. If the executive is dissatisfied with the decision of a jury or a judge, it can file, or cause to be filed, false criminal charges against the offending individuals and have them arrested in order that they be silenced or punished.

Allowing this case to stand without correction would disrupt the balance of powers between the various branches of government which our Constitution created. The concept of inviolability of a juror for his verdict was a basic principle of the common law which is integral to the concept of due process. It is hard to believe that any court in this land would allow an attack on a juror without recognizing this as an affront to the Constitution. That the Supreme Court of Wyoming has done just that, highlights the need for a definitive statement by the highest court of the land, admonishing that the conduct complained of is a violation of the constitutional rights of all who are called to serve the judicial system.

This Court held in *Imbler v. Pachtman*, 424 U. S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), that there is an absolute immunity for state court prosecutors from actions under 42 U. S. C., § 1983 for actions they might take within their judicial function. The limits of this immunity have yet to be defined. The immunity was found necessary to protect the vigorous and fearless performance of the prosecutor's duty that is essential to the

proper functioning of the criminal justice system. *Imbler v. Pachtman,* at 428. This case presents a question of whether the immunity should extend to protect a prosecutor from liability for his assaults on a citizen summoned to serve the criminal justice system.

When the need for fearless prosecution comes directly in conflict with the need for fearless decision making by a citizen jury, a determination must be made as to which of these needs is most sacred and worthy of protection. The Wyoming Supreme Court determined that among the competing needs, the need for vigorous prosecution outweighs the need for fearless citizen jurors. That determination should be reviewed. State law does not control a federal cause of action, even though it is asserted in state court. *Martinez v. State of California,* 444 U. S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980). This is required by Article VI of the United States Constitution. The question of the extent of immunity must be decided under federal law.

This case presents a most extreme case of prosecutorial misconduct. This case presents the least justification for the extension of prosecutorial immunity. If there is any area in which a prosecutor should be held responsible for his actions, this case falls within it. A clear statement as to whether prosecutorial immunity should extend, in its absolute form, to this extreme situation, would answer the question of what limits, if any, the principle of prosecutorial immunity has. Because of the rarity of cases reflecting gross abuse of power on the part of a prosecutor, directed against the judicial system, this Court will not likely have a similar opportunity to

address the issue here presented. The Court should take this opportunity to determine whether any limits exist to absolute prosecutorial immunity.

This case also presents the question of whether the dissemination of press releases is within the judicial function of a prosecuting attorney and, as such, whether it is then protected by absolute immunity. The Wyoming Supreme Court decided that the press release was so protected because it was, "within the outer perimeter of the prosecutor's authority and discretion." This decision is in conflict with the decisions of the federal courts of appeals on this question which held that press releases were not protected by absolute immunity. *Marrero v. City of Hialeah*, 625 F. 2d 499 (5th Cir. 1980); *Hampton v. Hanrahan*, 600 F. 2d 600 (7th Cir. 1979); *Helstoski v. Goldstein*, 552 F. 2d 564 (3rd Cir. 1977); *Walker v. Calahan*, 542 F. 2d 681 (6th Cir. 1976), cert. den. 430 U. S. 966, 97 S. Ct. 1647, 52 L. Ed. 2d 357.

There is also a conflict between the circuits on this issue. The Ninth Circuit approved the decision of a district court finding leaks to the press protected by absolute immunity. *Sperl v. Deukmejian*, 482 F. Supp. 1026 (1980), 642 F. 2d 1154 (9th Cir. 1981). District courts in other circuits have made similar holdings. *Gutierrez v. Vergari*, 499 F. Supp. 1040 (S. D. N. Y. 1980), *Strong v. Slaton*, 510 F. Supp. 161 (N. D. Ga. 1981). Because of the present conflict which exists between the circuits, citizens of various areas of the country are afforded different rights and protections under 42 U. S. C. § 1983. The issue needs to be clarified by the United States Supreme Court so that all citizens will be treated equally, without regard to where they live or are injured.

The Wyoming Supreme Court also applied the wrong test to determine whether the conduct was within the immunity. The United States Supreme Court, in *Imbler* determined that the immunity extended to activities "intimately associated with the judicial phase of the criminal process." The standard used by the Wyoming Supreme Court, "within the outer perimeter of the prosecutor's authority and discretion," overwhelms the restrictions of the test set out in *Imbler*.

The final issues presented in this case deal with the Wyoming Supreme Court's award of judgment to the Defendant Dekmar, the prosecutor's investigator, based on an immunity he had never asserted. The Plaintiff contends that this action denies him due process of law. The states are required to afford citizens due process of law by the Fourteenth Amendment to the United States Constitution. This provision binds the judicial branches of state courts, as well as the states' executive branches. State courts are required to afford litigants the basic elements of procedural due process. Among those elements are notice of the allegations of opposing parties and an opportunity to present evidence rebutting those allegations.

In this case the Plaintiff was given no notice that the investigator asserted a qualified immunity of "good faith". The investigator never did assert it. The Wyoming Supreme Court recognized this. "Dekmar claims he is entitled to absolute immunity," (p. 18, Slip Opinion). After recognizing that the investigator is not accorded an absolute immunity, the Wyoming Supreme Court held that he would be entitled to qualified immunity, despite the fact that he had never raised the defense in his

pleadings or ever even used the terms "good faith" or "reasonable belief". Once the Wyoming Supreme Court had decided to extend the benefit of the unasserted defense to the investigator, it went on to determine the facts as they applied to this defense, without affording the Plaintiff an opportunity to present evidence on the defense.

Despite the jury's findings that the investigator was liable for punitive damages, which required the jury to find the investigator guilty of willful, wanton or malicious conduct, the Wyoming Supreme Court determined that, "We find no evidence of bad faith or unreasonable conduct by Dekmar." Based on that finding, the Wyoming Supreme Court determined, "as a matter of law that he acted reasonably, in good faith." This clearly indicates that the Wyoming Supreme Court placed the burden of proof of bad faith on the Plaintiff. This is directly contrary to the holding of the United States Supreme Court that, "the burden is on the official claiming immunity to demonstrate his entitlement." *Dennis v. Sparks*, 101 S. Ct. 183 (1980).

It has long been recognized that states cannot create immunity to federal civil rights actions, even if those actions are pursued in state court. What the State of Wyoming is prohibited from doing directly, it is attempting to do indirectly in this case. By placing procedural roadblock, such as allowing unpleaded affirmative defenses, before civil rights litigants in state courts, and by altering substantive aspects of § 1983 causes, such as changing the burden of proof and quantum of evidence, a state can dilute the protection of this statute as easily as by declaring its own immunities. Section 1983 was created

to control state action and enforce the Fourteenth Amendment. If states are allowed to dilute its protection, its purpose will not be served.

CONCLUSION

The issues presented by this case need to be addressed and clarified by the United States Supreme Court. The facts of this case are unique. As the trial judge stated, there is no case "on all 4's with this case." Thomas Rupe was compelled to serve as a juror. He asked to be relieved from that service but his request was denied. He approached jury service as a civic duty and did his best to perform that duty. Because of his conscientious efforts, he was attacked and punished.

The Wyoming Supreme Court not only found that Mr. Rupe was not entitled to compensation for his damages but punished him further by ordering him to pay the costs incurred by the defendants. The impartial jury system is the most cherished base of our system of law. It should be protected from attacks, no matter what the source. The mere fact that a person is a prosecutor or an employee of a prosecutor should not give them authority to beat a jury into submission with false criminal charges. It is often said that no man is above law. That principle should be reaffirmed.

There are limits to the principle of prosecutorial immunity. That fact was recognized in *Imbler v. Pachtman,* but the defining of those limits was left to a later case. This case is the appropriate one for defining those limits.

As the concurring opinion in *Imbler* recognized, "Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be 'monstrous to deny recovery.'" In this case the reason has disappeared and the denial of recovery by the Wyoming Supreme Court is truly monstrous, not only to Thomas Rupe, but to the judicial system which he was serving when he angered the defendants.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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